YONG CHOOI FONG, RE: EX P; PERWIRA HABIB BANK (M) BHD.

HIGH COURT MALAYA, KUALA LUMPUR
ABU MANSOR ALI J
[BANKRUPTCY NO. D5-29-1070 OF 1991]
10 SEPTEMBER 1991

BANKRUPTCY: *Filing of notice of motion (notis usul) to set aside the bankruptcy notice - In lieu of filing affidavit - Whether regular and proper - Bankruptcy Act, s. 3(i) Bankruptcy Rules 1969, rr. 18, 95 and 98 instead of filing his affidavit on or about 1 June 1991 on 6 June 1991 the judgment debtor filed his notice of motion (notice usul) and prayed for the following relief:*

(i) the setting aside of the bankruptcy notice

(ii) that no act of bankruptcy had been admitted under the said notice.

(iii) such other orders or relief and

(iv) costs.

CIVIL PROCEDURE: *Striking out of pleadings by the writ - When necessary.*

Counsel for the judgment creditor contended that the filing of the notice of Motuni to set aside the bankruptcy notice was irregular and improper being contrary to r. 95 of the Bankruptcy Rules which requires the filing of an affidavit within 3 days from the date of the service of the bankruptcy notice in order to set aside the bankruptcy notice.

The Counsel for judgment creditor argued that since r. 95 is the procedure which the judgment debtor should have availed himself, the filing of the notice of motion under r. 18 is not applicable.

Held:

[1] Since the procedure for setting aside the bankruptcy notice has been provided for by implication excludes the procedure as provided for by r. 18.

[2] The filing of the notice of motion is in order although 7 days had passed if there are other reliefs to be prayed for other than set-off etc, but in no way can the judgment debtor be allowed to go behind the judgment. Based on the facts, the primary object of the judgment debtor in filing notice of motion was to set aside the bankruptcy notice on grounds which the Court had already disposed of.

[3] The Court has a discretion to strike out the pleadings in order to prevent parties being put to expense by frivolous, vexatious or hopeless litigation.

[Objection of petitioner upheld. Notice of motion dismissed]

Cases referred to:
Re A debtor [1981] 2 All ER 987 ***(cit)***
Tractors Malaysia Bhd. v. Charles Au Yong [1982] CLJ (Rep) 355 ***(foll)***
Reichel v. Magrath [1889] 14 AC 665 ***(foll)***
Riches v. Director of Public Prosecutions [1973] 1 WLR 1019 ***(cit)***
Metropolitan Bank v. Pooley [1885] 10 App ***221 (cit)***

Legislation referred to:
Bankruptcy Act 1967, s. 3(1)(i)
Bankruptcy Rules 1969, rr. 18, 95, 98

Other source referred to:
The Law and Practice in Bankruptcy, Williams and Muir Hunter, 19th Edn., p. 38

For the judgment debtor - Shahul Hameed Amirudin; M/s. Sri Ram & Co.
For the judgment creditor - Sitpah Selvaratnam; M/s. Skrine & Co.

JUDGMENT

Abu Mansor Ali J:

On 10 September 1991, I upheld the preliminary objection of the petitioner and I dismissed the notice of motion of the judgment debtor in encl. (5) praying the setting aside of a bankruptcy notice. I said I would give my reason. I do so now.

By his notis usul (notice of motion) dated 6 June 1991 Encl. (5) the judgment debtor prays for the following orders:

(a) an order that the bankruptcy notice herein be set aside or alternatively, be stayed on such terms and conditions that this Honourable Court deems just;

(b) a declaration pursuant to r. 98 of the Bankruptcy Rules 1969 that no act of bankruptcy has been committed by Yong Chooi Fong under the said bankruptcy notice;

(c) that such further orders or directions be made or given as this Honourable Court deems just;

(d) that all costs of and occasioned by this application be the costs in the cause.

On 3 September 1991 in open Court when it was for hearing the Counsel for the judgment debtor applied for a postponement. I refused the application as I held there was no good reason for the postponement. The motion was fixed as early as June 1991 and the reason given was, Mr. Sri Ram, who was Counsel had to appear that day before Y.A. Dato' Shaik Daud bin Hj. Ismail. Counsel could not be in two places at the same time and En. Amiruddin was then appearing for the judgment debtor, though he said he only got the file that morning.

At the outset Cik Selvaratnam for the judgment creditor raised a preliminary objection and the Court proceeded to hear her. She contended that the filing of the notis usul to set aside the bankruptcy notice was irregular and improper as the procedure for setting aside the bankruptcy notice was already provided for in r. 95 of the Bankruptcy Rules. Rule 95 provides:

> 95. (1) The filing of an affidavit shall operate as an application to set aside the bankruptcy notice, and thereupon the Registrar shall fix a day for hearing the application, and shall give not less than three clear days' notice thereof to the debtor, the creditor and their respective solicitors, if known.

Under r. 95 of the said Rules she further contended the judgment debtor, in order to set aside the bankruptcy notice should have filed his affidavit stating his set-off or counter-claim etc. Within 7 days from the date of the service of the bankruptcy notice on him. It was duly served on him on 25 May 1991 and the bankruptcy notice carried the usual endorsement reminding him to file such affidavit setting out his defence. In this instant of filing his affidavit on or about 1 June 1991 the judgment debtor has filed this notice of motion on 6 June 1991 which was conceded as out of time.

Counsel for the judgment creditor further argued that since the procedure in r. 95 is the procedure which the judgment debtor should have availed himself, the filing of the notice of motion under r. 18 of the Bankruptcy Rules could not be entertained. Rule 18 of the Bankruptcy Rules states:

18. Except where these Rules or the Act otherwise provide, every application to the Court shall, unless the Court otherwise directs, be made by motion supported by affidavit.

She emphasized that when the procedure is already governed by r. 95 by the filing of an affidavit r. 18 of the Rules providing application by motion is not applicable. She argued if the judgment debtor were to be allowed to file a notice of motion praying for such orders after the 7 days had elapsed the Court, would indirectly be allowing him an extension of time thus allow him to circumvent the act of bankruptcy the judgment debtor had already committed. She cited *Re a debtor* [1981] 2 All ER 987 *CA* as authority to support her application that encl. (5) be dismissed with costs.

En. Amiruddin Counsel for the judgment debtor in reply commented on the absence of any notice from the judgment creditor's Counsel that she would be raising this preliminary objection. There was also an absence of anything suggestive of irregularity or anything improper in the affidavit filed by the judgment creditor. The Court's reply to this was illegality or irregularity can be raised at anytime which was settled law.

The learned Counsel for the judgment debtor firstly submitted the bankruptcy notice served was defective because the words "7 days" mentioned in the endorsement did not comply with s. 3(1)(i) of the Bankruptcy Act in that it must be mentioned 7 days from the service of such notice to him. I find there is no merit whatsoever in this complaint as the Counsel for the judgment creditor correctly pointed out that the "7 days" referred to within which the judgment debtor must file his affidavit setting out his counterclaim and set-off under r. 95 relate to and has already mentioned at the commencement of the bankruptcy notice itself. The judgment creditor was also following the set form for such a bankruptcy notice.

The Counsel for the judgment debtor then argued that the filing of the notice of motion under r. 18 of the Rules is correct procedure where the litigant, such as the judgment debtor, was out of time and was asking for more than just filing an affidavit to set aside the bankruptcy notice. He submitted that the judgment debtor has to resort to the filing of a notice of motion under r. 18 because, he elaborated in the motion encl. (5) the judgment creditor prays for the following reliefs: (a) for the setting aside of the bankruptcy notice. For this Counsel concedes an affidavit is sufficient but then, he submitted, judgment debtor was also praying in (a): "atau digantung mengikut terma dan syarat yang Mahkamah ... anggap adil" and in (b) he says the judgment debtor prays that no act of bankruptcy had been committed under the said notice. In (c) he prays for other orders or reliefs and (d) for costs.

He further argues that if the Counsel for the judgment creditor is correct that a notice of motion cannot be filed after the 7 days had elapsed then a litigant has no remedy whatsoever. He therefore submitted that after the 7 days the judgment creditor has to resort to r. 18 by filing a motion under r. 18 of the Rules.

I considered the argument of learned Counsel for the judgment debtor. I find in this particular instant there is no substance in his argument that after the 7 days in the bankruptcy notice a litigant could proceed as he had proceeded by filing of a notice of motion for the purpose he had in mind.

Clearly to me in this present case the intention of the judgment debtor in the filing of the notice of motion, as he says in prayers (a), (b) and (c) is clearly in substance for the sole purpose of setting aside of the bankruptcy notice the procedure for which has been provided for by the filing of an affidavit under r. 95 of the said Rules.

In Rule 95 it says in no uncertain terms the filing of an affidavit by the judgment debtor in due time "shall operate as an application" to set aside the bankruptcy notice and the judgment debtor has by statute been given 7 days of the service on him of such notice to do so else he commits an act of bankruptcy. The position in Malaysia is more than settled following the Federal Court's decision in *Tractors Malaysia Bhd. v. Charles Au Yong* [1982] CLJ (Rep) 355 approving *Reichel v. Magrath* [1889] 14 AC 665 and s. 3 of the Bankruptcy Act finally settled it that failure to file an affidavit results in the judgment debtor committing such act of bankruptcy.

Under r. 95 upon the filing of the affidavit the Court would then fix a date for the hearing of this application. I hold that in this case that since the procedure for setting aside the bankruptcy notice has been provided for by implication excludes the procedure as provided for by r. 18. The prayer in (b) encl. (5) is not standing as a specific distinct prayer but would be a consequential order in the event that the judgment debtor is successful in his application.

That leads me to the question whether the notice of motion can be filed at all and if in the affirmative whether there is any other relief or is there anything else other than set-off that might be prayed for by encl. (5).

In the authority produced by the judgment debtor, *The Law and Practice in Bankruptcy* by Williams and Muir Hunter 19th Edition p. 38, the learned author says:

> (b) On grounds other than set off, etc.
>
> The debtor may apply by motion (that is not by the summary affidavit procedure of B.R.139) to set aside the notice on other grounds, eg. irregularity, bad service, payment (or quaere legal tender) of the debt, etc.; the time limit of seven days now fixed by B.R. 138 does not apply to such applications. But the Court cannot on such an application go behind the judgment and inquire into the validity of the debt, as it can in the case of a petition....

It would appear the filing of the notice of motion is in order although 7 days had passed if there are other reliefs to be prayed for other than set-off etc. but in no way can the judgment debtor be allowed to go behind the judgment. As already referred to the primary object of the judgment debtor in filing notice of motion was to set aside the bankruptcy notice on grounds which the Court had already disposed of. I find that the judgment debtor has no other relief. The only affidavit filed in time in support contained but bare statements that judgment debtor has set-off and counterclaim.

In *Riches v. Director of Public Prosecutions* [1973] 1 WLR 1019 Lord Justice Lawton cited with approval the words of Lord Blackburn in *Metropolitan Bank v. Pooley* [1885] 10 AC at page 221 to the effect that striking out of pleadings by the Court may be necessary by the very essence of justice to be done to prevent parties being put to expense by frivolous, vexatious or hopeless litigation. Clearly where it is so clear that if a litigant could not get that remedy but would waste the judicial time in prolonging hopeless action the Court has a discretion and a duty to clear the case off its list. For the above reason I hold the judgment creditor succeeds in their preliminary objection for reasons stated above and I dismiss encl. (5) with costs.

Also found at [1992] 2 CLJ 1262